



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 25 OF 2015

ABDULKARIM SALEH MUHSIN.....PLAINTIFF

VERSUS

1. NEDIUM MOHAMED IBRAHIM

2. SARA ABDELLA ABDUSEMED

3. ZUM ZUM INVESTMENT LIMITED

4. CHIEF LANDS REGISTRAR.....DEFENDANTS

RULING

1. By a Notice of motion dated 21/11/2019, the plaintiff/applicant prayed that the statement of defence filed by the three defendants be struck out on account that it grounded on the allegations that the plaintiff was not a shareholder and director of the 3rd defendant a fact that had been disproved by the court in its ruling of 18/10/2019. On account of the said ruling, the plaintiff contends, the defence had become untenable having been disproved of its sole substratum and thus deserves not to be sustained. It was equally prayed that upon the striking out, judgment be entered for the plaintiff as prayed in the plaint.

2. The motion was supported by the Affidavit of the Applicant/plaintiff which essentially reiterated the grounds of the application by exhibiting the ruling of Njoki J. In the ruling the judge found and held:-

“After making reference to the Forensic Document Examiner’s Report and in particular the findings with regard to the exhibits marked A1 to A15, the report dated 17th May 2019 leaves no doubt that the plaintiff is a shareholder and Director of the 3rd defendant. It is therefore my finding that the plaintiff has established a prima facie case with a probability of success”.

3. Even though the defendants were served and an Affidavit of service duly filed, they neither filed any responses nor attended court to oppose the application. The consequence is that the application was thus deemed unopposed and was ordered to be heard in the absence of the Defendants/respondents.

4. I have had the opportunity to read the statement of defence filed and I entertain no doubt that the said defence takes the view that the plaintiff's suit lacks merit because the plaintiff is not a director and not the majority shareholder of the 3rd defendant hence there was no obligation upon the 1st and 2nd defendants to involve him in the decision making of the 3rd defendant.

5. That foundation pleaded to resist the plaintiff's claim was wholly upset and demolished when the judge ruled that the plaintiff was not only a director but also the chairman of the 3rd defendant being the majority shareholder. In the ruling the judge said

“In this case the plaintiff is the majority shareholder...

The 3rd defendant has three shareholders. These are the plaintiff, the 1st and 2nd defendants.”

6. Without a valid defence to the plaintiff's claim, it would be a failure on the part of the court to sustain the defence on the court file and therefore strain the plaintiff by asking to go to trial against a sham or just no defence at all. This court takes the view that to sustain the defence in its current form would serve no ends of justice at all but undermine the very notion of just determination of court disputes. In

...I wish to just add that there being a finding that the defence raised no triable issue, there was no magic in letting the matter proceed further. To do that would defeat the overriding objective of the court to do substantial justice to the parties and to achieve expeditious disposal of court disputes as enshrined in Article 159 2(b).

7. On the basis that the defence filed remains upset and there being nothing to controvert that fact, it not being said that the ruling has been challenged, I do find that the statement of defence dated 16/02/2015 now discloses no defence at all for which reason I struck it out.

8. Having so struck out the defence, the plaint remains uncontroverted and undefended. Being so undefended no issue remains to be determined by the court hence I do enter judgment for the plaintiff as prayed in the plaint. I therefore grant to the orders of:-

a) A permanent injunction directed to the 1st, 2nd 3rd & 4th defendants and restraining them from selling disposing, leasing or in any other way alienating any of the sub-division plots aggregating 570 plots and arising from title no. CR. 17051, CR No. 9750 (LAND REF NO. SUBDIVISION NO. 1067/1/MN, PLOT NO. MSA/BLOCK XXII/205, PLOT NO. MN/1/6431 and plot no. MN/1/6432.

b) An order that all the revenue emanating from the defendant be deposited in the company amount domiciled at middle East Bank, Mombasa Branch, A/C No. 225133018 to be operated jointly between the plaintiff and the 2nd defendant.

c) The sale of the 11 plots being plot no. 7928, 7929, 7422, 7869, 8005, 8006, 8009, 7930, 7926, 7370 and 7378 without the participation of the plaintiff is declared illegal, as against the plaintiff and the company, and that the 1st and 2nd defendant to pay to the plaintiff on behalf and to the account of the 3rd defendant all the proceeds therefrom. Such value be agreed within 45 days from today and in default be assessed by a registered valuer upon application by either party to the suit. For that reason, I grant to the parties the liberty to apply.

d) I award the costs of the suit to the plaintiff to be paid by the 1st, 2nd and 4th defendants.

Dated and signed at Mombasa this 19th day of December 2019.

P.J.O. OTIENO

JUDGE

Dated and delivered at Mombasa this 20th day of December 2019.

LADY JUSTICE D. CHEPKWONY

JUDGE